JD–(SF)–21-04
Long Beach, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 13, AFL-CIO

and

Cases 21-CC-3314
21-CE-368

APPLIED INDUSTRIAL MATERIALS
CORPORTION

and

METROPOLITAN STEVEDORING COMPANY

(Party in Interest)

and

PACIFIC MARITIME ASSOCIATION

(Party in interest)

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

(Party in Interest)

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DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in Los Angeles, California, on December 15 and 16, 2003.. The charges were filed by Applied Industrial Materials Corporation (AIMCOR) on December 5, 2002. On August 25, 2003, the Regional Director for Region 21 of the National Labor Relations Board (Board) issued a Complaint and Notice of Hearing alleging violations by International Longshore

and Warehouse Union, Local 13, AFL-CIO (Union or Respondent) of Section 8(b)(4)(i) and (ii)(B) and Section 8(e) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from Counsel for the General Counsel (General Counsel), counsel for the Respondent, counsel for the Charging Party, and counsel for the ILWU. Upon the entire record,[1] and based upon my observation of the witnesses and consideration of the briefs submitted,[2] I make the following:

Findings of Fact

I. Jurisdiction

AIMCOR is a Delaware corporation, with offices and warehouses located in Long Beach, California, where it is engaged in the business of purchasing petroleum coke from various refineries and selling and shipping the coke from its warehouses located in Long Beach. In the course and conduct of its business operations, AIMCOR annually sells and ships from its Long Beach, California facilities goods valued in excess of $50,000 directly to points outside the State of California.

Metropolitan Stevedoring Company (Metro), is engaged in the business of providing stevedoring and terminal services in Long Beach, California. In the course and conduct of its business operations, Metro annually performs services for AIMCOR valued in excess of $50,000.

It is admitted, and I find, that AIMCOR and Metro are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The parties stipulated, and I find, that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

[1] The motions of the General Counsel and the ILWU to correct the transcript are granted and the transcript is hereby corrected accordingly.

[2] By motion dated February 26, 2004, the General Counsel moved to strike the post hearing briefs of Respondent Union and the ILWUL for untimeliness. The Respondent Union and the ILWU filed an opposition, with accompanying declarations. The briefs of the Respondent Union and the ILWU were timely received in the San Francisco office of the Division of Judges on February 23, 2004, at 2:19 and 2:21 p.m., respectively. The General Counsel's motion is denied.

III. Alleged Unfair Labor Practices

A. Issues

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(b)(4)(i) and (ii)(B) of the Act by engaging in a work stoppage against Metro on July 18, 2002, and whether the Respondent has violated and is violating Section 8(e) of the Act by entering into and maintaining an agreement with Metro that requires Metro to not handle products or do business with AIMCOR.

B. Facts

AIMCOR ships petroleum coke out of the Port of Long Beach (POLB) at Pier G. Since 1962, Metro, as the terminal operator for the POLB, has had a "master preferential" exclusive lease from the POLB to operate the ship loading system at Pier G for the POLB. Metro's employees are represented by the Union. [3] AIMCOR's employees are represented by a different labor organization, the International Union of Public and Industrial Workers (IUPIW).

The original 1970 "Petroleum Coke Loading Contract" between Metro and a predecessor of AIMCOR expired in 1980. Metro and AIMCOR have never entered into a subsequent agreement following the expiration of this agreement, but have generally continued the relationship set forth in the contract either on a year to year basis or on an ad hoc work order basis. The expired 1970-1980 agreement provides, inter alia, as follows:

> Contractor [Metro] is a party to the Pacific Maritime Association and the Master Contracting Stevedore Association agreements with various labor unions. The Contractor is obliged to comply with all of the terms and conditions of such agreements as now exist and as the same may be modified in the future.

AIMCOR owns several large warehouses on POLB property. It receives petroleum coke at these warehouses by truck, stores the product in its warehouses, and ships the product on ocean going vessels. The product is transported from the warehouses to the vessels by means of a system of interconnected conveyor belts.

One of the warehouses owned by AIMCOR is know as "AIMCOR East." Beneath the floor of AIMCOR East is a tunnel housing a conveyor belt known as C-17. The tunnel and conveyor belt are also owned by AIMCOR. The petroleum coke on the warehouse floor is dropped or pushed by front-end loaders into "drawdowns" or chutes and ends up on C-17.

Since about 1970, AIMCOR's receiving and storage functions, including the intra-warehouse operation of C-17, have been performed by its own employees represented by the IUPIW. However, AIMCOR's shipping or "reclaiming" functions, including the operation of C-17, have historically been performed by employees of Metro. Thus, when vessels are not being loaded, AIMCOR customarily performs the receiving work in its warehouses with its own employees; but when vessels are being loaded, AIMCOR contracts with Metro to furnish the necessary front-end loaders and other equipment along with a crew or "gang" of approximately five or seven Union-represented employees to operate the front-end loaders and perform work in AIMCOR's warehouse and tunnel. The cargo is then transported by C-17 to conveyor belt C-

[3] Metro is a member of the Pacific Maritime Association (PMA). PMA and it members are parties to a collective bargaining agreement with the ILWU, known as the Pacific Coast Longshore Contract Document (PCLCD).

16. After being dropped on C-16 the cargo proceeds along an interconnected series of conveyor belts leading to the ship. All conveyor belts and other equipment necessary to transport the product to the ship and load the ship, beginning with C-16, is controlled and operated by Metro under the exclusive lease from the POLB.

Since 1997 AIMCOR has complained to Metro primarily about excessive labor costs, but also about deficiencies of workers Metro obtained from the Union's hiring hall for the ship loading operation. Metro has in turn approached the Union with these concerns seeking concessions for AIMCOR. However, no accommodation has been reached. Finally, on April 15, 2002, [4] AIMCOR sent Metro a notice of intent to terminate the arrangement between the two entities for labor and equipment. The termination was to become effective sixty days later. The notice goes on to state:

> We have decided to take this work in-house and assign it to our employees who are represented by the International Union of Public and Industrial Workers ("IUPIW"). Our collective bargaining agreement with the IUPIW includes the work at our Long Beach operation. Over the next sixty (60) days, we look forward to working with you toward a smooth transition of this work.

Metro advised the Union of this notice. Following receipt of this notice various meetings took place. On June 6, representatives of AIMCOR, Metro and the Union met to discuss the matter. The Union's Local President , Ramon Ponce de Leon, acknowledged that the Union understood that AIMCOR hand cancelled its agreement with Metro, and said that he believed AIMCOR could not do this because the work belonged to the Union. Joseph Lombardi, Vice-President of Operations for AIMCOR, replied that he believed AIMCOR had the right to do the work with its own union employees, on its own property, and with its own equipment. Pursuant to the terms of the sixty-day notice, AIMCOR was to terminate its agreement with Metro on June 15. Ponce de Leon requested that the termination date be extended until July 15, and Lombardi agreed..

According to the testimony of Albert Garnier, Vice-President of Operations for Metro, the aforementioned meeting between AIMCOR, Metro and the Union was Ponce de Leon's idea. Accompanying Ponce de Leon at the meeting were certain members of the Union's executive board and other individuals. After the participants stated their positions, Ponce de Leon requested more time for the Union's executive board to review the matter and discuss the many proposals that Metro had made over the years to accommodate AIMCOR.

No resolution of the matter was reached. On July 17, AIMCOR notified Metro that it was going to take control of its own warehouse shipping operations on the following day, July 18, and load a vessel. Garnier phoned Ponce de Leon and advised him of this.

On July 18, Metro started its conveyor system and advised AIMCOR that it could start up C-17 and begin transferring material to C-16. Shortly thereafter the conveyors were stopped [5] and Metro was notified by the Union that the work force was "standing by on health

[4] All dates or time periods hereinafter are within 2002 unless otherwise specified.
[5] There are many ways to stop the conveyor system. In addition to the central control panel, operated by a Metro employee, each separate conveyor belt has a shut-down button; stopping one conveyor belt automatically shuts down all the upstream conveyor belts, including C-17.

and safety." [6] This initiated a meeting of the Labor Relations Committee. According to the PCLCD, if the health and safety matter cannot be resolved by the Labor Relations Committee, the contract provides for immediate arbitration at the work site. Apparently, an "Area Arbitrator" was standing by as the arbitration took place approximately an hour after the shutdown.

At this arbitration proceeding a representative of the Union's executive board began presenting the Union's position to the arbitrator. Nothing was said about the alleged health and safety concerns; rather, the Union representative began by stating, according to Garnier, "this is our work and we are not going to have somebody else do it." He went on to argue that Metro had "control of the product," and that therefore it was the Union's work. Metro argued that it had no control over what AIMCOR does with its cargo.

The arbitrator immediately ruled that the work stoppage was illegal inasmuch as there was no health and safety claim. He then went on to agree with the Union and denied Metro the right to handle cargo that was placed on C-17 by other than Union workers.

The arbitrator followed up his oral decision with a written "Interim Ruling" dated July 19, as follows:

> DECISION:
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> 1. Local 13 is guilty of an illegal work stoppage, a violation of Section 11.1.
> 2. Work shall be resumed as directed by the Employer [Metro] with the following stipulation.
> 3. Based on the evidence available and presented at the time of the Hearing, the Area Arbitrator orders the following when work resumes: Metropolitan (a PMA member) shall not load cargo to the vessel that was laden onto cargo belts by non ILWU longshore workers.

The award was appealed, and on October 31, the Coast Arbitrator, who has the final authority in such matters, affirmed the decision of the Area Arbitrator. The Coast arbitrator interpreted the following provisions of the PCLCD:

> Section 1. Scope of this Contract Document and Assignment of Work to Longshoremen
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> "…It is the intent of this Contract Document to preserve the work of employees employed by members of the PMA."
>
> 1.1 "…all movement of cargo on vessels or loading to and discharging from vessels of any type and on docks…is covered by this Contract Document and all labor involved therein is assigned to longshoremen as set forth in this Section 1."

[6] There is a no-strike clause in Metro's contract with the Union. However, an exception exists if there is an immediate threat to the health and safety of workers.

> 1.11 "This Contract Document covers the movement of outbound cargo only from the time it enters a dock and comes under the control of any terminal, stevedore, agent or vessel operator covered by this Contract Document …In instances where an Employer asserts it had no control of the movement of the cargo in question, the responsibility of proving such lack of control shall be upon the employer. "

The Coast Arbitrator determined that the Employer, Metro, had not proved lack of control of the movement of the cargo. Regarding Metro's claims that AIMCOR had control of C-17, the Coast Arbitrator stated that, "The judgments made as to *when* to turn the switch, the crucial element of the continuous cargo movement control over the dock, remains with Metropolitan." (Original emphasis.) The arbitrator found that AIMCOR did not have the option of permitting AIMCOR to operate of C-17, because, "As past Coast cases have held, the Employers cannot enter into arrangements with non-PMA members which modify the terms of the PCLCD." The arbitrator's decision also states:

> Agreement Interpreted
>
> This decision is as required by the Agreement. Issues that may arise under the NLRA were neither presented to the Coast Arbitrator…nor decided herein.

After AIMCOR notified Metro that it would be terminating its agreement, Metro advised AIMCOR that since Metro employees would no longer be performing the ship loading work in AIMCOR East, it would not be appropriate for Metro to continue to have control over C-17. [7] Rather, AIMCOR would be in control of C-17 and could itself start or stop C-17. This required rather minor computer program "keystroke" changes in Metro's control room, so that Metro would no longer have the capability to start C-17 from its control room.[8] Rather, Metro would communicate with AIMCOR by radio or phone and advise AIMCOR when C-16 and the other system-wide belts were operating and ready to receive the cargo from C-17. [9]

Regarding this matter, Garnier testified that in the '80's Metro began installing automatic start systems in each of its customers' warehouses, including AIMCOR East, since it had agreements with those customers to perform the work on their sites. When AIMCOR gave notice that it no longer wanted Metro to perform the work, according to Garnier,

> "then these modifications that we had made to the conveyors in the '80's would essentially have to be undone and—we would have to have our system stand along (sic) from their system because, if we were not going to have any responsibility, on their site, then we did not want to have our equipment connected to their equipment. "

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[7] On May 23, Garnier wrote, inter *alia*, in an internal Metro e-mail, "I think that we will have to modify our master start program for AIMCOR to show a separation of control, should an arbitrator be called out on the issue."

[8] While this transition for AIMCOR East was rather simple, the two or three other AIMCOR warehouses required certain electrical wiring or rewiring. Garnier estimated that all of the work involved in making all the AIMCOR warehouses' conveyors independent of Metro required perhaps ten hours of work, for which AIMCOR would be charged.

[9] However, as noted above, there were a number of safeguards along the conveyor system, and the shutting down of any conveyer would automatically shut down any other upstream conveyors, including C-17.

Garnier testified that Metro, in making these changes, did not believe that it was in violation of any provisions of the PCLCD requiring it to preserve Union work. Thus, according to Garnier,

> Well, all of these sites were not part of the dock and the issue before us was, if AIMCOR wants to take control of their sites, then Metropolitan, as the Terminal Operator, needs to honor their request, as our customer and we…will not allow our system to flow back into their system, if we are not going to be essentially allowed on their site.

Asked about the meaning of the aforementioned April 23 internal e-mail, Garnier denied that part of the motivation for rewiring or changing the computer program was to put Metro in the best possible position to present a case at an arbitration. Garnier testified, "Well, if the master start system was not changed, we…would be starting C-17 not AIMCOR and there would be nothing even to talk to the Arbitrator about. We were still in control."

Garnier further explained that Metro was essentially being fired by AIMCOR, and that :

> If it means I have to undo systems that I put in place 10 years earlier, to make it more efficient when we were, in fact, doing the work, then I have got to undo it and I have to undo it, in a way, that clearly shows that we are no longer in control because that is what they are telling us; they are in control, not us.

Asked whether Metro initiated or encouraged AIMCOR to terminate the agreement, Garnier testified that, to the contrary, it was Metro's strongest desire to maintain the work and it had been attempting to do so since 1997 when it began receiving complaints from AIMCOR that it brought to the ILWU. Thus, according to Garnier, "…at some point in time, the competitive nature of what was going on [10] would cause AIMCOR to lose market share; that, eventually, they would come to us with a termination. So, back in '97 we started that request for consideration."

C. Analysis and Conclusions

For some thirty years AIMCOR, or its predecessors, had contracted with Metro to perform the ship loading operations in AIMCOR's POLB warehouses, and the work was performed by Metro's Union-represented employees. On April 15, AIMCOR notified Metro of its intent to terminate this arrangement, and on July 18, AIMCOR attempted to perform the work with its own employees. The record is clear and it is admitted that the Union had a work-preservation objective for stopping work and shutting down Metros's conveyor system during the July 18 ship loading operations. The issue is whether the Union, by targeting Metro as the object of its work-preservation claim, is targeting a primary employer that has the right to assign the work in question, or whether Metro was a secondary, neutral employer used by the Union to apply indirect pressure upon AIMCOR. If Metro is a secondary employer, then the Union's work-preservation objective does not validate its conduct and the Union is in violation of Section

[10] Record evidence indicates that the Union had negotiated lesser rates for similar bulk work at another port.

8(b)(4)(i) and 8(b)(4)(ii)(B) of the Act.[11] *Local 438, United Pipefitters (George Koch Sons, Inc.), 201 NLRB 59 (1973), enf'd. George Koch Sons. Inc. v. NLRB, 490 F2d 323 (4th Cir. 1973*).

The Union[12] maintains that Metro was the primary employer in that, (1) it was in control of the conveyor system, that without the conveyor system it was impossible for ships to be loaded, and therefore, by virtue of these facts, Metro retained and controlled the right to assign its own employees to perform any and all ship loading work; (2) the conveyor system, together with the computerized technology necessary to operate it, a "technological innovation" developed by Metro, and therefore Metro retained the right to control the manner in which AIMCOR could use the conveyor system, including the right to veto AIMCOR's selection of its work force; and (3) that since Metro was contractually bound to preserve work for ILWU-represented employees, Metro's voluntary collusion with AIMCOR to thwart this contractual commitment makes Metro an "offending" employer.

The Union states in its brief that, "[I]t can only be concluded that Metro controls all ship loading and therefore, has the right to assign work. " By this contention, the Union seems to equate control of the workflow (conveyor system) with control of the workforce (assignment of employees). However, these are not interrelated concepts; rather, they are separate and distinct. In fact, it is not even necessarily true that Metro is always in control of the workflow, as it would appear reasonable to assume that either AIMCOR or the ship's officer in control of loading the ship may interrupt the workflow for a variety of reasons. And while the Union argues that the work could not be accomplished without Metro, neither could the work be accomplished without AIMCOR, as the supplier of cargo at one end of the conveyor system, or the shipping company, as the operator of the vessel, at the other. Each of the three entities seem indispensable to the workflow.

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[11] Section 8(b)(4)(I) and (ii)(B) provides, in relevant part, that it shall be an unfair labor practice for a labor organization or its agents—
(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of his employment to…transport, or otherwise handle or work on any goods…or to perform services; or
(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case, an object thereof is—
(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title]: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

[12] As noted above, both the Respondent Union and the ILWU, a party in interest and participant at the hearing, filed briefs. Most, but not all, of the parties' contentions in their briefs are generally similar and overlapping. It seems unnecessary to differentiate between the arguments of the Respondent Union and the ILWU, and therefore the arguments and positions of either are simply designated as "Union" arguments.

The Union maintains that because Metro is the employer in actual or nominal control of the entire conveyor system, and the conveyor system is the key link in the ship loading operation, this makes Metro the "primary" employer in the process; but the primary employer in terms of Section 8(b)(4)(i) and (ii)(B) has never been defined or interpreted as the employer who performs the most work, employs the largest workforce, operates the most equipment, or is the most essential employer at the jobsite. Rather, as noted, the primary employer in terms of Section 8(b)(4)(I) and (ii)(B) is the employer with the right to assign the work in dispute.

The cases cited and relied upon by the Union makes this principle abundantly clear. Thus, in *George Koch Sons, supra*, the Board states at page 63:

> Since Phillips [the neutral employer] did not have the actual ability to obtain the work in dispute, the Respondents' actions could not have caused Phillips *to assign the work* in dispute to the employees represented by the Respondents.
>
> * * *
>
> Specifically, of late, the Board has characterized its approach simply in terms of a right-of-control test. The test as stated would seem to imply that the Board looked solely at the pressured employer's "contract right to control" the work at issue at the time of the pressure to determine whether that pressure was primary or secondary. In fact, this is not now the Board's approach nor was it ever. (Emphasis added.)

And in *NLRB v. International Longshoremen's Ass'n,* 447 U.S. 490, (1980), the Supreme Court states at page 504:

> Second, the contracting employer must have the power to give the employees the work in question--the so-called "right of control" test… The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work. "Were the latter the case, [the contracting employer] would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary." (Quoting from National Woodwork Manufacture Ass'n v. NLRB, 386 U.S. 612 (1967) at 644-645) (footnotes omitted.)

Accordingly, I find no merit to this contention of the ILWU.

Next the Union maintains that the computerized conveyor system, developed and refined by Metro over the years, is in the nature of a technological innovation, and that Metro enjoys an ownership or implicit proprietary interest in this system; therefore it would not be unlawful for Metro to enter into a work-preservation agreement with the ILWU to restrict the terms and conditions under which other employers may use the system. In support of its position, the Union principally relies *upon International Longshormen's Association, 266 NLRB 230 (1983),* affirmed in relevant part, *American Trucking Ass'n., Inc. v. NLRB, 734 F.2d 966 (D.C. Cir. 1984).*

I find no merit to this argument. In the cited case, which deals with the technological innovation of the containerization of cargo for ocean going vessels, the essential facts underlying the decision are (1) that this technological innovation took work away from employees who traditionally performed the work prior to containerization, and (2) the workers' employers continued to own the containers; therefore the employers and the unions

representing the employers' employees may establish lawful work-preservation rules restricting the use of such containers by others. In the instant case, C-17 is owned by AIMCOR. Therefore there is no implicit right retained by Metro to dictate or limit AIMCOR's use of C-17. Nor did a technological innovation cause the Union's workers to lose work; rather the work was simply reassigned by AIMCOR to its own employees for business-related reasons having nothing to do with innovative technology.

Further, the Union did not raise the matter of the conveyor system as a technological innovation either as an affirmative defense in its answer to the complaint , or as a distinct issue at the hearing. Thus, the conveyor system as a technological innovation was not explored on the record. While there is limited record testimony that over the years Metro updated the conveyor system to reflect the current technology, there is clearly no record evidence sufficient to establish that such incremental changes over the years constitute a technological innovation. Moreover, it seems reasonable to assume, in the absence of contrary evidence, that Metro was neither an innovator of ship loading conveyor systems nor the technology with which to run them.

The Union also maintains Metro is not a neutral or "unoffending" employer within the meaning of *National Woodwork, supra*, and *George Koch Sons, supra.* Thus the Union argues Metro could have taken the position that it had no right under its PCLCD contract with the ILWU, requiring Metro to preserve unit work, to permit AIMCOR's termination of the agreement. Further, Metro's concurrent attempt to get concessions for AIMCOR from the Union, its cooperation with AIMCOR in transitioning the work from Metro's employees to AIMCOR's employees, and its affirmative action in "rewiring" the system so that it would no longer be able to start up C-17, shows Metro was a willing and active accomplice to AIMCOR's decision to perform the work itself. "In essence, according to the Union, " Metro was attempting to circumvent the PCLCD by contracting away longshore work," and "did not lose control, it gave it away. "

I find no merit to these contentions. First, the record is clear and there is no contrary evidence that Metro's revenue is generated from performing work for customers at the POLB, including AIMCOR; that it was in Metro's interests to retain the work; and that for many years Metro attempted to intercede with the ILWU on behalf of AIMCOR for that very purpose, namely, so that AIMCOR could receive some concessions and would *not* elect to perform the work itself. Nor, during all these years, insofar as the record shows, did the Union ever take the position that Metro was somehow in violation of its commitments under the PCLCD by attempting to act as a mediator. Clearly, Metro's attempt to broker some sort of arrangement between the Union and AIMCOR was intended to be in the best interests of Metro and therefore the Union.

Ultimately, as no concessions were forthcoming from the Union, AIMCOR gave notice to terminate its agreement with Metro. There is no evidence that Metro and AIMCOR contrived this scenario in order to put pressure on the Union. Upon receiving this notice, Metro correctly believed that AIMCOR had the right to terminate the arrangement, and to this end began cooperating with AIMCOR. Indeed, it appears that Metro relinquished its control of C-17 at least in part to cooperate with AIMCOR: thus, Garnier states in his May 23, email, "I think that we will have to modify our master start program for AIMCOR to show a separation of control, should an arbitrator be called out on the issue." However, Metro also continued to seek a resolution of the matter so that it, and its Union-represented employees, would retain the work. Clearly, Metro, as the exclusive terminal manager, was simultaneously seeking to honor its commitments both to AIMCOR and to the Union, and, contrary to assertions of the Union, was not attempting to circumvent the PCLCD by contracting away longshore work.

The Union maintains Metro should have been more assertive and should have simply advised AIMCOR that it (Metro) had no right under its PCLCD contract with the Union to permit AIMCOR's termination of the agreement. Metro had a contractual obligation with the Union to preserve unit work; it also had an obligation to AIMCOR, one of its customers, to perform the work AIMCOR contracted it to perform, and a concomitant obligation to refrain from interfering with AIMCOR's right to perform the work itself if it elected to do so. There is simply no evidence that AIMCOR lacked the right to terminate the agreement, or that Metro could have legitimately and in good faith asserted that AIMCOR lacked this right.

The cases cited by the Union are inapposite. In *National Woodwork, supra*, the employer entered into a contract permitting it to obtain and install doors of its own choosing. It obtained pre-fitted doors rather than blank doors, as it could have done, despite its contractual agreement with the union providing that union members would not be required to handle pre-fitted doors. Under these circumstances the employer was deemed to be the primary employer and a legitimate object of the union's picketing rather than an unoffending neutral employer, because it could have acted to preserve bargaining unit work by using blank doors. Similarly, in *Painters District Council No. 20 (Uni-Coat Spray Painting, Inc.),* 185 NLRB 930 (1970), the Board found that the employer was not an "unoffending employer" in view of its active role in seeking a license and subcontract to use a product which was required to be applied by spray painting, even though this would cause it to breach its collective-bargaining contract that prohibited spray painting. Unlike the cited cases, AIMCOR decided to do the work itself with its own employees, and left Metro with no options. Since Metro could not perform the work, there was no way it could preserve jobs for ILWU employees. Accordingly, I find this argument of the Union to be without merit.

Next the Union maintains that even assuming *arguendo* Metro is a neutral employer and that the Union's primary dispute is with AIMCOR, nevertheless the Union's work stoppage against Metro did not have an improper motive or intent. Rather, the Union argues that since it had a good faith belief Metro retained the "right of control," and therefore was the offending employer, there can be no violation of Section 8(b)(4)(B) of the Act. In support of this contention, the Union relies upon *United Scenic Artists, Local 829 v. NLRB,* 762 F.2d 1027, 1032-1033 (D.C. Cir. 1985). *United Scenic Artists* is inapposite. There, it was found that the union did not know the terms of the contractual relationship between the neutral employer, with whom it had a collective bargaining contract containing work preservation language, and the primary employer. In the instant case, the Union clearly knew and was timely updated on the current relationship between Metro and AIMCOR; indeed, it even met with an AIMCOR representative and had the opportunity to clarify any concerns, and it requested and obtained a delay from AIMCOR in order to explore the matter further. I find no merit to this contention of the ILWU.

On the basis of the foregoing, I find that the Respondent Union has violated and is violating Section 8(b)(4)(i) and (ii)(B) of the Act as alleged in the complaint by engaging in a work stoppage against Metro on July 18. *Local 438, United Pipefitters (George Koch Sons, Inc.), supra.*

The complaint also alleges that the Union violated Section 8(e) of the Act [13] by its conduct in obtaining an arbitration decision that is contrary to Section 8(e). *In Newspaper and Mail Deliverers (New York Post), 337 NLRB 608, 609 (2002)*, the Board, citing *Sheet Metal Workers Local 27 (Thomas Company, Inc.) 321 NLRB 540*, states: "A facially valid contract provision may violate Section 8(e) if it is authoritatively construed by an arbitrator as having a meaning that is inconsistent with Section 8(e). Such a construction will provide the necessary 'agreement' for an 8(e) violation."

The Union, in addition to reiterating "right of control" arguments that have been found above to lack merit, maintains it did not "enter into" an unlawful agreement within the meaning of 8(e) because the PCLCD contains explicit language prohibiting unlawful agreements. In support of this argument the ILWU cites *Longshore ILWU Local 13 (Egg City), 295 NLRB 704, 705 (1989.* That case deals with an entirely different contract provision in the PCLCD:

> Section 11.51, Refusal to cross a legitimate and bona fide picket line…Collusive picket lines, hot cargo picket lines, secondary boycott picket lines and demonstration picket lines are not legitimate and bona fide picket lines within the meaning of this agreement.

Section 1, Section 1.1 and Section 1.11 of the PCLCD, *supra*, upon which the Union and the Coast Arbitrator rely in the instant case, govern work preservation matters, not refusals to cross picket lines of other unions, and contain no such exculpatory language. Moreover, the Coast Arbitrator specifically stated that he was interpreting only the meaning of provisions under the PCLCD, and not issues that may arise under the Act. Accordingly, I find this argument of the Union to be without merit.

The Coast Arbitrator interpreted Section 1, Section 1.1 and Section 1.11, *supra*, of the PCLCD to require Metro to cease handling AIMCOR's product. Accordingly, I find the Union has violated Section 8(e) of the Act, as alleged in the complaint. Further, to the extent that the contract has been so authoritatively interpreted, it is unenforceable and void. *Newspaper and Mail Deliverers (New York Post),supra; Sheet Metal Workers Local 27 (Thomas Company, Inc.), supra.*

Conclusions of Law

1. AIMCOR and Metro are employers and persons engaged in commerce within the meaning of Section 2(2), (6) and (7) and Section 8(b)(4)(i) and (ii)(B) of the Act.

2. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

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[13] Section 8(e) provides, in relevant part, that:
It shall be an unfair labor practice for any labor organization and any employer to enter into any agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore and hereafter containing such an agreement shall be to such extent unenforceable and void…

3. By engaging in a work stoppage against Metro on July 18, 2002, the Union has violated and is violating Section 8(b)(4)(i) and (ii)(B) of the Act.

4. By entering into and seeking to enforce or apply Sections 1, 1.1 and 1.11 of the PCLCD through the arbitration procedure, the Union has violated and is violating Section 8(e) of the Act.

The Remedy

Having found that the Union has violated and is violating the Act as set forth above, I shall order that it cease and desist therefrom, take other affirmative action as set forth below, and post an appropriate Board notice attached hereto as "Appendix."

ORDER[14]

The Respondent, International Longshore and Warehouse Union, Local 13, AFL-CIO, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Inducing or encouraging individuals employed by Metropolitan Stevedoring Company (Metro), or by any other persons engaged in commerce or in an industry affecting commerce to engage in a strike or refusal in the course of their employment to transport or otherwise handle or work on any goods, articles, or products, or to perform any services, where an object thereof is to force or require Metro, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of Applied Industrial Materials Corporation (AIMCOR) or to cease doing business with AIMCOR.

(b) Threatening, coercing, or restraining Metro, or any other person engaged in commerce or in an industry affecting commerce , where an object thereof is to force or require Metro, or any other person, to cease using, selling handling, transporting, or otherwise dealing in the products of AIMCOR, or to cease doing business with AIMCOR.

(c) Entering into, maintaining, enforcing, or giving effect to the Coast Arbitrator's decision under the PCLCD concerning the July 18, 2002 work stoppage.

(d) In any like or related manner violating Section 8(b)(4)(i) and (ii)(B) and Section 8(e) of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Withdraw, and notify, in writing, the Coast Arbitrator, the PMA, and all parties to the arbitration process involved with processing or deciding the Union's July 18, 2002 grievance against Metro, that it has withdrawn the said grievance against Metro.

[14] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Request, in writing, the Coast Arbitrator any other appropriate persons or parties to vacate the said arbitration award against Metro.
(c) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
(d) Sign and return to the Regional Director sufficient copies of the notice for posting by Metro and AIMCOR, if willing, at all places where notices to employees are customarily posted.
(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: March 15, 2004

Gerald A. Wacknov
Administrative Law Judge

[15] If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WIIL NOT induce or encourage individuals employed by Metropolitan Stevedoring Company (Metro), or by any other persons engaged in commerce or in an industry affecting commerce to engage in a strike or refusal in the course of their employment to transport or otherwise handle or work on any goods, articles, or products, or to perform any services, where an object thereof is to force or require Metro, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of Applied Industrial Materials Corporation (AIMCOR) or to cease doing business with AIMCOR.

WE WILL NOT threaten, coerce, or restrain Metro, or any other person engaged in commerce or in an industry affecting commerce , where an object thereof is to force or require Metro, or any other person, to cease using, selling handling, transporting, or otherwise dealing in the products of AIMCOR, or to cease doing business with AIMCOR.

WE WILL NOT enter into, maintain, enforce, or give effect to the Coast Arbitrator's decision under the PCLCD concerning the July 18, 2002 work stoppage against Metro.

WE WILL withdraw and notify the Coast Arbitrator and all parties to the arbitration proceeding that we have withdrawn the July 18, 2002 grievance against Metro.

WE WILL request, in writing that the Coast Arbitrator and any other appropriate persons or parties vacate the said arbitration award against Metro.

WE WILL NOT in any like or related manner violate Section 8(b)(4)(i) and (ii)(B) and Section 8(e) of the Act.

Accordingly, we will not take any action against Metropolitan Stevedoring Company, or any other employer, either by way of a work stoppage or arbitration proceeding or by any other means, with a purpose of causing or attempting to cause Metropolitan Stevedoring Company to cease handling petroleum coke or other products of Applied Industrial Materials Corporation (AIMCOR) at the Port of Long Beach or at any other port.

Further, we will withdraw our grievance and arbitration proceeding against Metropolitan Stevedoring Company and request the Coast Arbitrator and any other appropriate persons to declare the arbitration award null and void.

INTERNATIONAL LONGSHORE AND
WAREHOUSE LOCAL 13, AFL-CIO
(Labor Organization)

Dated: _____ By: _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be referred to the Board's office, 888 South Figueroa Street, 9the Floor, Los Angeles, CA 90017-5449; telephone (213) 894-5200.